

The Ten Principles of Ex Ante Competition Regulation

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Introduction

Governments and competition agencies considering new laws to regulate competition need not act blindly. Without much experience in competition regulation, they can and should draw upon well-recognized international principles for the design and implementation of *ex ante* regulation. This article identifies ten principles for *ex ante* competition regulation designed to avoid pitfalls in regulatory schemes. It draws directly on the prior work of the OECD, as outlined principally in the *Guiding Principles for Regulatory Quality and Performance*.¹ Note that this article does not necessarily endorse the concept of competition regulation as it relates to the digital sector or any other dimension of the economy.² Rather, this article is offered for those jurisdictions that have considered or imposed *ex ante* regulation to achieve salutary goals. A failure to observe and apply these principles, by contrast, would reflect a failure to observe fundamental principles of regulatory design.

In response to the digital economy, regulators in various jurisdictions are busy considering (or in a few cases have already advanced) *ex ante* regulations for large technology platforms.³ Although *ex ante* regulation itself is not new (for example, many public health and safety regulations are *ex ante*), competition agencies have spent several decades focused on advancing principles of *deregulation*, working to open markets to competition by removing inefficient (and sometimes protectionist) government restraint. Thus, many jurisdictions and enforcement agencies may lack recent

experience in the exercise of designing and imposing *ex ante* competition regulation.

Any new proposals are likely to be extremely influential in their impact, potentially with significant international implications. Thus, governments and agencies need to fully evaluate the interaction of competition-based regulation with the functioning of domestic and international markets. Drafting regulations in a compartmentalized and purpose-driven way may create legal conflicts, economic or political tensions, or other problems that may ultimately diminish the benefits of an effective competition policy.

These risks can be moderated, however, through the application of the following ten principles designed to guide government regulation. The first eight principles were first proposed in a 1995 OECD recommendation but have been re-endorsed by the OECD several times since. They have stood the test of time and should be the first stop on a would-be regulator's checklist. They are also useful for more experienced regulators seeking to test or implement their proposals to ensure that their proposals are directed at legitimate goals and not improperly impinging on other countries' economic interests (thus avoiding pitfalls of nationalism, protectionism, or industrial engineering). The final two principles emanate from recommendations and guidance of the OECD Competition Committee and reflect fundamental legal principles that are relevant in the context of affirmative market intervention. While all of these principles are important when creating entirely new regulatory schemes, they

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¹ OECD, GUIDING PRINCIPLES FOR REGULATORY QUALITY AND PERFORMANCE (2011), <https://www.oecd.org/daf/competition/37318586.pdf> [hereinafter OECD GUIDING PRINCIPLES].

² As laid out in the copious literature on regulatory capture and the benefits of deregulation, there are many good reasons for governments not to interfere with markets.

³ In some cases, these proposals would apply broadly and potentially extend beyond tech platforms. See, e.g., European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html; Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).

are also valuable for regulators seeking to assess, expand, or revise existing regulations.

Discussion: The Ten Principles

1. Good regulation should serve clearly identified policy goals.⁴

This first principle asks regulators to consider the most basic question: why are you regulating? Identifying a policy goal is a critical first step in producing sound regulation. Regulations do not exist in a vacuum: they eventually leave the drafting table and must be implemented and coexist with other tools (e.g., enforcement). In short, regulation involves many stakeholders. Expressing clearly identified policy goals is a unifying lodestar for drafters and enforcers. It can point to a common purpose for all involved and serve as a useful benchmark to measure the effectiveness of the regulation in place.

Clarity in policy goals also provides a necessary reference point for the public, targets of regulation, and other interested parties. In some cases, the process of identifying policy goals may reveal that tools aside from *ex ante* regulation may be better means to address them.

2. Good regulation should have a sound legal and empirical basis.⁵

Regulatory action should be firmly grounded in the rule of law. Of course, any regulator must be duly authorized. In addition, *ex ante* regulations should be consistent with existing legal obligations and widely held legislative principles such as certainty and proportionality.

Regulations must also be rooted in empirical analysis and proof. This is particularly crucial in new and emerging technology industries, where traditional understandings of market structure may not apply and the boundary between harm

and benefit may not have been as well considered as in more established sectors. Empirical proof should always draw upon case-specific facts, weighing information as objectively as possible. But regulators can also look to other sources of guidance such as competition economics, which “have developed into an analytical ‘toolbox’ that can be used to understand market outcomes and firm conduct.”⁶ One does not substitute for the other, however. Therefore, this principle requires that regulation be based on empirical factual analysis that is consistent with applicable competition economics. Failure to properly lay the empirical foundation for a new regulation will undermine its legitimacy and its ability to deliver the promised benefits.

3. Good regulation should produce benefits that justify costs, considering the distribution of effects across society.⁷

Regulators should carefully consider the total expected costs and benefits of each regulatory proposal. Where possible, this should involve consultation with stakeholders and members of the public to identify and quantify the potential impact of a proposed regulation. This can improve regulatory quality as well as compliance while reducing eventual enforcement costs. As an example noted in the OECD materials, it would not make sense to impose an overhaul of customs regulations in order to seize a minimal amount of improper goods.⁸

This principle, like many others, encourages regulators to examine other rules and methodologies in their toolkits. In this case, regulators should consider whether existing regulations—or perhaps a minor tweak to the same, rather than a wholesale new regulation—would achieve the same policy goal at a lower cost.⁹ This is consistent, in the competition context, with the goal of creating net benefits for

⁴ OECD GUIDING PRINCIPLES, *supra* note 1, at 3.

⁵ *Id.*

⁶ OECD, Economic Analysis and Evidence in Abuse Cases—Background Note by Simon Roberts, DAF/COMP/GF(2021)6, ¶ 22 (Mar. 23, 2022), [https://one.oecd.org/document/DAF/COMP/GF\(2021\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2021)6/en/pdf).

⁷ OECD GUIDING PRINCIPLES, *supra* note 1, at 3.

⁸ APEC & OECD, INTEGRATED CHECKLIST ON REGULATORY REFORM: A POLICY INSTRUMENT FOR REGULATORY QUALITY, COMPETITION POLICY, AND MARKET OPENNESS 29 (2005), <https://www.oecd.org/regreform/34989455.pdf>.

⁹ *Id.* at 16 (“Overall, the constant accumulation of measures often creates duplication and contradiction in the legal framework, creating unnecessary costs for businesses and citizens.”).

consumers and that regulation serves “competition rather than competitors.”¹⁰

4. Good regulation should minimize costs and market distortions.¹¹

Ex ante regulation is often seen as a more cost-effective alternative to *ex post* enforcement actions. Merely being a cheaper alternative for the government, however, should not justify implementation of a new regulation. Consideration must be given to the minimization of cost and burden placed on the economy as a whole. This implies a need to estimate—with the requisite level of rigor—both costs and benefits using empirical information gleaned from past investigation.

It follows that moderating the costs of regulation should also be an objective of the regulatory scheme. Regulators should endeavor to disrupt target sectors as little as possible when imposing regulation. Presently, *ex ante* regulation is often considered for new and rapidly developing sectors where *ex post* enforcement may be seen as “too slow.”¹² The assumption is often made that early intervention will allow the enforcer to prevent tipping or monopolization by a firm that ultimately becomes dominant. But the dynamics of these target sectors may not be fully established or fully understood, and assuming that monopolization is inevitable may inhibit market growth, innovation or investment. Moving to quickly may also result in a failure to consider the benefits of network externalities that would be lost in light of regulatory intervention. Regulations that are targeted to achieve an

objective while focusing on minimizing disruptions will limit the potential for over-regulating and minimize the risk of discouraging innovation and investment in rapidly progressing areas.

5. Good regulation should promote innovation through market incentives and goal-based approaches.¹³

Innovation is a key driver of progress in any industry, and governments are increasingly recognizing its importance as an engine for economic growth. For example, many competition enforcement actions consider the potential impact on innovation in the same analyses that consider more traditional effects, such as price or output. Consumers rely on innovation to drive improvements in their products, services, and overall experience.

This principle also reflects the reality that innovation within an industry subject to regulation does not “stop at the border” of the regulating jurisdiction. This is particularly true in digital markets, where developments and innovations tend to be rapidly deployed around the globe. There is a risk—perhaps very significant risk—that the regulatory actions of one jurisdiction could significantly affect innovation in a particular field that otherwise would benefit consumers worldwide. Alignment between regulators and governments on the need to preserve and promote innovation within regulatory structures should be prioritized across different jurisdictions. Agreement on this issue is also crucial to deliver the benefits of innovation to consumers.

¹⁰ OECD, Competition on the Merits, DAF/COMP(2005)27, at 9 (Mar. 30, 2006), <https://www.oecd.org/competition/abuse/35911017.pdf> (“It is widely agreed that the purpose of competition policy is to protect competition, not competitors.”).

¹¹ OECD GUIDING PRINCIPLES, *supra* note 1, at 3.

¹² OECD, Ex-Ante Regulation and Competition in Digital Markets – Note by BIA, DAF/COMP/WD(2021)79, ¶ 1 (Nov. 24, 2021), [https://one.oecd.org/document/DAF/COMP/WD\(2021\)79/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf) (citing Common Understanding of G7 Competition Authorities on “Competition and the Digital Economy” 2 (June 5, 2019), https://www.autoritedelaconurrence.fr/sites/default/files/2019-07/g7_common_understanding.pdf (“Competition law is flexible – it can and should adapt to the challenges posed by the digital economy without wholesale changes to its guiding principles and goals. The challenges of digital transformation require competition authorities to ensure that their specific tools, resources and skills for competition law enforcement are up-to-date.”); Joint Memorandum of the Belgian, Dutch and Luxembourg Competition Authorities on Challenges Faced by Competition Authorities in a Digital World 5 (Oct. 10, 2019), https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdldl.joint_memorandum_191002.pdf (“ex-post enforcement can be too slow in digital and other fast moving markets”); A New Competition Framework for the Digital Economy: Report by the Commission “Competition Law 4.0” 25 (Sept. 30, 2019), https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3 (“an evolutionary approach towards rule development may be too slow, such that a more rapid rule-setting is needed”).

¹³ *Id.*

Finally, regulations should be designed to incentivize innovation. Overly complex, burdensome, or poorly designed regulatory regimes can discourage would-be innovators from establishing a presence or expanding in a jurisdiction. While regulations can maintain a certain level of competition in product markets, they can also create barriers by increasing the uncertainty and cost of development, limiting the fields in which innovation would be profitable, or distorting the landscape for technologies that are developed.¹⁴ By reducing unnecessary regulatory burdens and developing sound regulations, governments can support economic growth by promoting innovation while continuing to build public trust as effective rule makers.¹⁵

6. Good regulation should be clear, simple, and practical for users.¹⁶

Ex ante regulation, by definition, seeks to prevent harmful conduct from occurring. This is only possible if the regulation is accessible to its users. Opaque and complex regulations are more likely to fail. Moreover, where one jurisdiction's unnecessarily complex regulation meets another, an impenetrable labyrinth may ensue, making it difficult for companies to comply, for aggrieved parties to recognize a breach, and for authorities to enforce. The effect of such a thicket may drive up costs and discourage further investment in the regulated sector.

Transparency in regulations should also extend to the process of designing the regulation. The procedures for proposing, drafting, and enacting new rules should be made clear to all stakeholders, with the goal of increasing public confidence in regulators and boosting the legitimacy of regulatory proposals.

7. Good regulation should be consistent with other regulations and policies.¹⁷

Regulations are most likely to be successful if they provide predictability to a wide array of stakeholders. Consistency with other existing regulations benefits markets by reducing the possibility that firms will face overlapping or conflicting regulatory requirements, and also ensures that new *ex ante* regulations in one area will not be in tension with existing regulations in another (e.g., we have witnessed such tension between privacy and antitrust concerns at times). Overlaps with existing laws can lead to complexity, increased cost, and reduced legal certainty, which in turn increases the likelihood of disputes and litigation. Practically speaking, ensuring consistency with existing regulations also reduces implementation costs and the time needed for target companies to comply with regulatory requirements. It can also bolster the legitimacy of the *ex ante* regulation and its underlying policy goal.

This principle applies not only to “black letter” regulations—such as treaty obligations, existing *ex ante* regulations from other branches of government, and guidance from *ex post* enforcers—but also to policies that may govern the creation of the regulation itself, such as requirements around public notice and frameworks for periodic review of regulations. Regulators should carefully consider the interplay between competition law and sectoral regulation. In particular, they should consider the existing role that competition enforcers may play, such as reviewing transactions, establishing safe harbors, and providing advisory opinions on permissible and impermissible conduct.¹⁸

¹⁴ OECD, REGULATORY REFORM AND INNOVATION 12, <https://www.oecd.org/sti/inno/2102514.pdf>.

¹⁵ OECD, RECOMMENDATION OF THE COUNCIL ON REGULATORY POLICY AND GOVERNANCE 24 (2012), <https://www.oecd.org/governance/regulatory-policy/49990817.pdf>.

¹⁶ OECD GUIDING PRINCIPLES, *supra* note 1, at 3.

¹⁷ *Id.*

¹⁸ See Stuart M. Chemtob, The Role of Competition Agencies in Regulated Sectors, Address Before the 5th International Symposium on Competition Policy and Law (May 11-12, 2007), <https://www.justice.gov/atr/file/519376/download>.

8. Good regulation should be compatible with competition, trade, and investment-facilitating principles at domestic and international levels.¹⁹

Ex ante regulation should not be an end unto itself, but one of numerous tools a country may utilize to enact its policy initiatives. Where *ex ante* regulations raise the possibility of altering the way a market functions, great care should be taken to ensure the proposed regulation is compatible with the country's broader economic aims. For example, in seeking to resolve issues in a discrete market, an *ex ante* regulation should not undermine a country's long-standing principle of competitive neutrality or the promotion of open market access.

The compatibility of *ex ante* regulation with a country's investment-facilitating principles is especially important as countries are increasingly competing for investors. A transparent regulatory framework consistent with foreign investment principles can be a powerful tool to attract and maintain foreign investment.²⁰

9. Good regulation should maintain competitive neutrality.²¹

"Protecting competition, not competitors" is a fundamental principle of competition law.²² In line with this principle, *ex ante* regulations should seek to uphold, not alter, the protection of the competitive process. *Ex ante* regulations that appear to favor certain market participants or particular segments of the competitive landscape—particularly those that have the effect of preferring domestic companies over foreign competitors—risk de-legitimizing both the regulation and its underlying policy goal. Regulations that do not preserve competitive

neutrality also increase the possibility of conflict with a country's existing and well-established competition law regime.

10. Good regulation should preserve due process protections.²³

Finally, *ex ante* regulations should not seek to alter the fundamental protections afforded to investigatory targets. For instance, regulations should allow for parties to understand the basis for any enforcement action, enable them to assess relevant factual information, and defend themselves as necessary. Parties should also be able to provide objective justification for their actions where the effects are ambiguous. In addition to ensuring consistency with a country's existing principles and regulations, the preservation of due process provides critical transparency to both potential regulatory targets and the public.

Conclusion

Ex ante regulations are not easy to devise and there is too much at stake to design them without great care. The potential impact on the target market segment, innovation, regulating jurisdiction, and potentially foreign jurisdictions, demand that *ex ante* regulations, and the processes to develop them, be rigorous, well-conceived and well-executed. These ten principles, founded on well-established OECD precedent, are an indispensable threshold for ensuring that *ex ante* regulation is done the right way, mindful of the many pitfalls that can occur when a government steps into an economic market to broadly impose its authority over market conduct.

¹⁹ OECD GUIDING PRINCIPLES, *supra* note 1, at 3.

²⁰ APEC & OECD, *supra* note 9, at 30.

²¹ OECD, RECOMMENDATION OF THE COUNCIL ON COMPETITIVE NEUTRALITY (2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.

²² See Maureen Ohlhausen & John Taladay, *Are Competition Officials Abandoning Competition Principles*, J. OF EUR. COMPETITION L. & PRAC. (forthcoming 2022), <https://ssrn.com/abstract=4042226>.

²³ OECD, RECOMMENDATION OF THE COUNCIL ON TRANSPARENCY AND PROCEDURAL FAIRNESS IN COMPETITION LAW ENFORCEMENT (2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465>.